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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOSE VALLE SALAZAR, Defendant and Appellant.	E065540 (Super.Ct.No. INF1201546) OPINION

APPEAL from the Superior Court of Riverside County. Anthony R. Villalobos, Judge. Affirmed.

Lewis Wenzell, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swanson, Lynne G. McGinnis, and Kristine A. Gutierrez, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

Defendant Jose Valle Salazar appeals an order denying his petition to strike two prison prior enhancements (petition) predicated on felonies which were reduced to misdemeanors under Proposition 47 (Pen. Code, § 1170.18[1]). Defendant contends the trial court was required to grant his petition and strike his prison prior enhancements (§ 667.5, subd. (b)) because the enhancements are no longer predicated on felony convictions. Defendant also argues the trial court violated his equal protection rights under the state and federal Constitutions by refusing to apply Proposition 47 retroactively to his prison prior enhancements, which were imposed before Proposition 47 took effect. We reject defendant's contentions and affirm the trial court order denying defendant's petition.

II

FACTUAL AND PROCEDURAL BACKGROUND

In October, 2012, the People filed an amended felony complaint, charging defendant with committing two robbery offenses (§ 211, counts 1 and 3) and two commercial burglaries (§ 459, counts 2 and 4), in May and June, 2012. The complaint also alleged two prison prior enhancements (§ 667.5, subd. (b)) predicated on felony convictions for possession of controlled substances in 2004 (Health & Saf. Code, § 11377, subd. (a)) and forgery (§ 470, subd. (d)) in 2007.

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[1] Unless otherwise noted, all statutory references are to the Penal Code.

In October 2012, defendant pled guilty to count 1 (robbery) and admitted the two prison prior enhancements. The trial court sentenced defendant to five years in prison, with execution of the sentence suspended. The court imposed three years' probation plus 270 days in jail, and dismissed the remaining charges. In 2014, defendant pled guilty to two drug possession offenses. As a result, the trial court revoked defendant's probation and imposed a five-year sentence for his 2012 robbery conviction and two enhancements.

In May 2015, defendant filed a petition for resentencing under Proposition 47, requesting the court to reduce to misdemeanors the two felony convictions that formed the basis of defendant's two prison prior enhancements.

On September 1, 2015, the trial court granted defendant's petition to reduce to a misdemeanor his forgery felony conviction (case No. INF058124), which formed the basis of one of his prison prior enhancements in the instant case. Also on September 1, 2015, the trial court granted defendant's petition to reduce to a misdemeanor his drug possession felony conviction (case No. INF036174), which formed the basis of his other prison prior enhancement in the instant case.

On September 21, 2015, the trial court denied defendant's petition for resentencing filed in the instant case in May 2015, on the ground count 1 (robbery) was not a qualifying felony under Proposition 47.

In December 2015, defendant submitted to the trial court, ex-parte and in propria persona, a letter stating that his two prison prior felonies were reduced to misdemeanors under Proposition 47, thereby invalidating his two prison prior enhancements. Defendant requested that the trial court resentence him, taking this into account. On December 29,

2015, the trial court denied defendant's request.

In January 2016, defendant, in propria persona, filed a motion for modification of his sentence on the grounds (1) he entered his guilty plea under duress (2) the court miscalculated his credits, and (3) his prison prior enhancements should be stricken because the underlying felonies were reduced to misdemeanors.

On January 29, 2016, the court held a hearing on defendant's motion for modification, and denied the motion. The court noted that the trial court denied striking defendant's prison prior enhancements on December 29, 2016, and also recalculated his credits. Defense counsel agreed there had been no change in circumstances. Thus there was nothing for the trial court to address in defendant's motion for modification. Defendant filed a notice of appeal of the January 29, 2016 order.

III

STRIKING SENTENCE ENHANCEMENTS

Defendant contends the trial court erred in denying his request for resentencing as to his two prison prior enhancements (§ 667.5, subd. (b)). Defendant argues the trial court must strike his prison priors because the felony convictions underlying them were reduced to misdemeanors. We disagree. Proposition 47 does not allow retroactive striking of sentence enhancements already subject to a final judgment.

Determination of the issue of whether defendant is entitled to have his prison prior enhancements stricken turns on our interpretation and application of two statutes: section 667.5, subdivision (b), the prison prior enhancement provision, and section 1170.18, Proposition 47's sentencing provision.

The enhancement statute, section 667.5, subdivision (b), "'provides a special sentence enhancement for [a] particular subset of "prior felony convictions" that were deemed serious enough by earlier sentencing courts to warrant actual imprisonment. . . .'" (*People v. Jones* (1993) 5 Cal.4th 1142, 1148.) The statute is intended "'"to punish individuals" who have shown that they are "'hardened criminal[s] who [are] undeterred by the fear of prison.'"' [Citation.]" (*People v. Abdallah* (2016) 246 Cal.App.4th 736, 742 (*Abdallah*).)

Imposition of a section 667.5, subdivision (b) enhancement "requires proof that the defendant '"(1) was previously convicted of a felony; (2) was imprisoned as a result of that conviction; (3) completed that term of imprisonment; and (4) did not remain free for five years of both prison custody and the commission of a new offense resulting in a felony conviction."' [Citations.]" (*Abdallah, supra,* 246 Cal.App.4th at p. 742; see *People v. Tenner* (1993) 6 Cal.4th 559, 563.)

Defendant argues that a section 667.5, subdivision (b) enhancement cannot be based on a felony conviction that has been reduced to a misdemeanor under Proposition 47. Defendant contends Proposition 47 implicitly allows the trial court to strike such an enhancement. Proposition 47, which went into effect on November 5, 2014, reclassified certain drug and theft-related felony and "wobbler" offenses as misdemeanors. It also created remedies for persons previously convicted of one of the reclassified offenses.

Proposition 47 provides resentencing for defendants who are currently "serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section ('this act') had

this act been in effect at the time of the offense . . . ." (§ 1170.18, subd. (a).) Such a defendant "may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing" in accordance with sections, that include Health and Safety Code section 11377 (possession of a controlled substance) and section 473 (forgery), as amended or added by Proposition 47. (§ 1170.18, subd. (a).)

Proposition 47 also applies to defendants who have already completed a sentence for one of the enumerated offenses. Those individuals can file an application with the court that entered the judgment of conviction to have the conviction designated as a misdemeanor. (§ 1170.18, subd. (f).) After relief is obtained under either subdivision (a) or subdivision (f) of section 1170.18, the defendant's conviction "shall be considered a misdemeanor for all purposes," with the exception of the firearm restrictions that apply to convicted felons. (§ 1170.18, subd. (k).)

Although Proposition 47 makes no mention of sentence enhancements, defendant contends he is entitled to have his two prison prior enhancements stricken because the predicate convictions must now be treated as "misdemeanor[s] for all purposes." (§ 1170.18, subd. (k).) Our state Supreme Court has granted review of several cases holding that the "misdemeanor for all purposes" designation in subdivision (k) of section 1170.18 does not apply retroactively to invalidate prior sentence enhancements imposed

under section 667.5, subdivision (b).[2] We likewise conclude that subdivision (k) of section 1170.18 does not apply retroactively to invalidate defendant's enhancements. This court previously considered and rejected the same argument in *People v. Jones*, *supra,* 1 Cal.App.5th 221, concluding "the direction of section 1170.18, subdivision (k) that any redesignated conviction 'shall be considered a misdemeanor for all purposes,' applies, at most, *prospectively* to preclude future or non-final sentence enhancements based on felony convictions redesignated as misdemeanors under Proposition 47." (*Id.* at p. 230;[3] italics added.) Defendant has provided no persuasive reason to depart from our holding in *Jones*.

As explained in *People v. Rivera* (2015) 233 Cal.App.4th 1085, 1100 (*Rivera*), "[T]he language in subdivision (k) of section 1170.18 that a conviction that is reduced to a misdemeanor under that section '*shall be . . . a misdemeanor for all purposes*' is not significantly different from the language in section 17(b), which provides that after the

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[2] Cases pending review, holding section 1170.18 does not provide for retroactive redesignation, dismissal, or striking of final pre-Proposition 47 sentence enhancements based on prior convictions that are subsequently reduced from felonies to misdemeanors pursuant to section 1170.18 include: *People v. Valenzuela* (2016) 244 Cal.App.4th 692, 706-707, review granted Mar. 30, 2016, S232900; *People v. Carrea* (2016) 244 Cal.App.4th 966, 971, review granted Apr. 27, 2016, S233011; *People v. Ruff* (2016) 244 Cal.App.4th 935, 938, review granted May 11, 2016, S233201; *People v. Williams* (2016) 245 Cal.App.4th 458, 473, review granted May 11, 2016, S233539; *People v. Jones* (2016) 1 Cal.App.5th 221, 230, review granted Sept. 14, 2016, S235901. *People v. Isaia* (2016) 2016 Cal.App.Unpub. LEXIS 7002, rev. granted Nov. 11, 2016, S237778, reached a different conclusion.

[3] Under a recent amendment to California Rules of Court, rule 8.1115, we may rely on *People v. Jones*, *supra,* 1 Cal.App.5th 221 (rev. granted Sept. 14, 2016) as persuasive authority while review is pending. (Cal. Rules of Court, rule 8.1115(e)(1), eff. July 1, 2016.)

court exercises its discretion to sentence a wobbler as a misdemeanor, and in the other circumstances specified in section 17(b), '*it is a misdemeanor for all purposes*.' (Italics added.) . . . [I]n construing this language from section 17(b), the California Supreme Court has stated that the reduction of the offense to a misdemeanor does not apply retroactively. [Citations.] We presume the voters 'intended the same construction' for the language in section 1170.18, subdivision (k), 'unless a contrary intent clearly appears.' [Citation.]"

Nothing in the language of section 1170.18 or the ballot materials reflects an intent to apply subdivision (k) retroactively. (*Rivera, supra,* 233 Cal.App.4th at p. 1100.) Proposition 47's remedial provisions apply only to cases in which a defendant is currently serving a sentence for a felony conviction that is now a misdemeanor (§ 1170.18, subd. (a)) and cases in which a defendant convicted of such a crime has already completed his or her sentence (§ 1170.18, subd. (f)). Moreover, the statute goes on to instruct that "[n]othing in this and related sections is intended to diminish or abrogate the finality of judgments in any case not falling within the purview of this act." (§ 1170.18, subd. (n).) Defendant's section 667.5, subdivision (b) prison prior enhancements are part of such a final judgment.

Citing *People v. Park* (2013) 56 Cal.4th 782 and *People v. Flores* (1979) 92 Cal.App.3d 461, defendant argues that Proposition 47 was intended to invalidate section 667.5, subdivision (b) enhancements included in final judgments. Defendant's reliance on these cases is misplaced. In both cases, sentencing on the charged offenses occurred after the prior felony convictions had already been reduced to misdemeanors. (See

Abdallah, *supra*, 246 Cal.App.4th at p. 747 [§ 667.5, subd. (b) enhancement did not apply to defendant sentenced *after* his prior felony conviction had been designated as a misdemeanor under Proposition 47].) This is not the case here. At the time of defendant's sentencing on the charged offenses, his two enhancements were predicated on felonies, which were not reduced to misdemeanors until after the judgment became final.

We also reject defendant's argument that subdivision (k) of section 1170.18 applies retroactively because it must be broadly and liberally construed to accomplish its purposes. (Ballot Pamp., Gen. Elec. (Nov. 4, 2014) text of Prop. 47, p. 74.) None of Proposition 47's stated purposes would be furthered by reducing sentences for felony convictions that do not qualify for reduction under Proposition 47 and are enhanced to account for recidivist behavior. Section 667.5, subdivision (b) focuses on the defendant's status at the time the defendant commits a felony.

Here, when defendant committed the charged crimes, he had already been convicted of two other felonies and had recently been released from prison. Because he reoffended so soon after his release, he was eligible for and deserving of additional punishment. (*People v. Levell* (1988) 201 Cal.App.3d 749, 754.) Nothing in the language of Proposition 47 or the related materials reflects an intent to absolve defendant of this additional punishment simply by virtue of the fact that his prior convictions must now be considered misdemeanors. As we held in *People v. Jones*, *supra*, 1 Cal.App.5th at page 230, "section 1170.18, subdivisions (a), (b), (f), and (g) explicitly allow offenders to request and courts to grant retroactive designation of offenses such as [defendant's]

prison prior, but no provision allows offenders to request or courts to order retroactively striking or otherwise altering an enhancement based on such a redesignated prior offense." We find no reason to depart from our prior holding.

IV

EQUAL PROTECTION

Defendant contends his two prison prior enhancements should be stricken retroactively under the equal protection clause of the state and federal Constitutions. Defendant argues there is no rational reason why the same offense reduced under Proposition 47 would support a section 667.5, subdivision (b) enhancement for a defendant prospectively, but not retroactively.

The United States and California Constitutions guarantee equal protection of the laws. (U.S. Const., 14th Amend., § 1; Cal. Const., art. I, § 7; see *In re Evans* (1996) 49 Cal.App.4th 1263, 1270 [the scope and effect of the two equal protection clauses is the same].) This guarantee assures that the Legislature and voters cannot adopt a classification that affects two or more similarly situated groups unequally, unless the classification has a rational relationship to a legitimate state purpose. (*People v. Brown* (2012) 54 Cal.4th 314, 328; *People v. Singh* (2011) 198 Cal.App.4th 364, 369.) This assumes that as in the instant case, the classification does not involve a suspect class or a fundamental right. (*Singh*, at p. 369.)

Defendant argues that refusing to apply Proposition 47 retroactively to enhancements creates two classes of defendants: (1) those sentenced after enactment of Proposition 47, who are able to avoid enhancements based on prior felony or wobbler

convictions (because the redesignations they obtain on those prior convictions apply prospectively) and (2) those sentenced before enactment of Proposition 47, who are unable to avoid enhancements based on prior felony or wobbler convictions (because the redesignations they obtain on those prior convictions do not apply retroactively). These two classes of defendants are distinguished by whether they were able to seek redesignation before or after the current sentence was imposed, which is a function of the date Proposition 47 took effect.

It is well settled that "'[a] reduction of sentences only prospectively from the date a new sentencing statute takes effect is not a denial of equal protection.'" (*People v. Floyd* (2003) 31 Cal.4th 179, 189.) "'[A] statute ameliorating punishment for particular offenses may be made prospective only without offending equal protection, because the Legislature will be supposed to have acted in order to optimize the deterrent effect of criminal penalties by deflecting any assumption by offenders that future acts of lenity will necessarily benefit them.'" (*People v. Smith* (2015) 234 Cal.App.4th 1460, 1468, quoting *People v. Kennedy* (2012) 209 Cal.App.4th 385, 398.)

There is no denial of equal protection here, because a classification defined by the effective date of an ameliorative statute rationally furthers the state's legitimate interest in assuring that penal laws will maintain their desired deterrent effect by applying punishment as originally prescribed. (*In re Kapperman* (1974) 11 Cal.3d 542, 545.) As noted by the United States Supreme Court, "the Fourteenth Amendment does not forbid statutes and statutory changes to have a beginning and thus to discriminate between the rights of an earlier and later time." (*Sperry & Hutchinson Co. v. Rhodes* (1911) 220 U.S.

502, 505.)

Furthermore, applying Proposition 47 only prospectively bears a rational relationship to the legitimate state interest of transitioning from the prior sentencing scheme to Proposition 47's sentencing scheme. Prospective sentencing changes based on an effective date presumably recognize "legitimate . . . concerns associated with the transition from one sentencing scheme to another." (*People v. Floyd*, *supra*, 31 Cal.4th at p. 191.)

Defendant has not established his equal protection rights were violated because defendants, who were sentenced after the effective date of Proposition 47, received more favorable treatment than those defendants, such as defendant, who were sentenced before Proposition 47.

V

DISPOSITION

The order denying defendant's petition to strike his two prison prior enhancements is affirmed.

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CODRINGTON
J.

We concur:

RAMIREZ
P. J.

McKINSTER
J.